No. 95905-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LEONEL ROMERO OCHOA,

Respondent,

BRIEF OF WACDL AS AMICUS CURIAE OBO RESPONDENT, LEONEL ROMERO OCHOA

From the Court of Appeals, State of Washington No. 48454-4-II

David T. Sulzbacher, #51555
Attorney for Amicus Curiae
1037 NE 65th Street, # 80304
Seattle, WA 98115
Ph: 206-734-4615
Email: david@sulzbacherlaw.com

Thomas E. Weaver, #22488
WACDL Amicus Committee
PO Box 1056
Bremerton WA 98337
Ph: (360) 792-9345

Rita Griffith, #14360
WACDL Amicus Committee
4616 25th Ave NE
PMB 453
Seattle, WA 98105-4523

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Respondent Leonel Romero Ochoa (Mr. Ochoa). WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has around 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. The signors of this Brief are authorized to file on behalf of WACDL and in pursuit of that mission.

II. ISSUE OF CONCERN TO AMICUS

Whether defendants in criminal cases have the right to impeach a complaining witness with evidence that the witness has filed an application for a "U-Visa," which provides powerful incentive to make exaggerated or false accusations and testify falsely in exchange for legal immigrant status?

III. ARGUMENTS AND AUTHORITY

The Court of Appeals correctly held that Mr. Ochoa was denied his confrontation clause and due process rights when the trial court prohibited him from introducing evidence of the alleged victim's ("Isidore['s]") past

and current attempts to procure a "U-visa." The U-visa program provides a tremendous immigration benefit to purported victims of crime who lack legal immigration status and who agree to cooperate with law enforcement in investigating and prosecuting their alleged abusers or assailants. The U-visa program, by virtue of its *quid pro quo* nature, creates powerful incentives to make false or exaggerated accusations.

The due process and confrontation clause violations were especially egregious in Mr. Ochoa's case because his defense depended entirely on his own credibility versus Isidore's credibility. Where, as in Mr. Ochoa's case, the government's key witness stands to obtain a benefit from the government in exchange for her cooperation and testimony against the defendant, and the trial depends substantially on the jury's determination of credibility, defendants must be permitted to cross-examine the witness with evidence of motive and bias.

Applying this principle, courts have long held that a defendant has the right to impeach a witness with evidence that the witness has received, or expects or hopes to receive leniency, or some other benefit from the government, in exchange for his testimony. If anything, the principle applies with even greater force to a witness seeking to obtain a U-visa given the incentives inherent in the program's structure.

A. The U-Visa Program and its Incentive Structure.

Few options exist to obtain legal status to live and work in the United States for the millions of noncitizens who enter the country without authorization, and they are subject to prosecution, deportation, and resulting separation from family and friends if apprehended. See generally Immigration and Nationality Act (INA), §§ 236, 237, 274C, 275; 8 U.S.C. §§ 1227, 1324c, 1325. The U-visa, however, is "a humanitarian 'island of niceness' in a sea of restrictive United States immigration laws." Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. Mich. J.L. Reform 915, 934 (2015) (quoting Katherine Ellison, *A Special Visa Program Benefits Abused Illegal Immigrants*, N.Y. Times, Jan. 8, 2010, at A19.)

The purpose of the U-visa program is twofold: first, "to strengthen the ability of law enforcement agencies to investigate and prosecute such crimes as domestic violence, sexual assault, and trafficking in persons," and second, "[to offer] protection to alien crime victims in keeping with the humanitarian interests of the United States." 72 Fed. Reg. 53,014-01 (Sept. 17, 2007), corrected, 72 Fed. Reg. 54,813 (Sept. 27, 2007).The U-visa seeks to achieve its dual aims by providing immigration and employment authorization to individuals who have "suffered substantial physical or mental abuse as a result of having been a victim" of qualifying

criminal activity.) 8 U.S.C. § 1101(a)(15)(U); 8 C.F.R. § 214.14(a)(9), (c)(7).

To obtain a U-Visa the applicant must: (1) "possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity," and (2) demonstrate that she is "being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based, and since the initiation of cooperation, has not refused or failed to provide information and assistance reasonably requested." 8 C.F.R. § 214.14(b)(3); see Romero-Perez v. Commonwealth, 492 S.W.3d 902, 906 (Ky. Ct. App. 2016).

The U-visa is popular and growing. Over 65,000 individuals have qualified for the U-visa by cooperating with law enforcement in investigating and prosecuting their alleged assailants or abusers since its inception in 2000. See Suzan M. Pritchett, *Shielding the Deportable Outsider: Exploring the Rape Shield Law as Model Evidentiary Rule for Protecting U Visa Applicants as Witnesses in Criminal Proceedings*, 40 Harv. J.L. & Gender 365, 369-70 (Summer 2017). By the end of 2016 there were 150,604 applications pending. Id. at 384. Most U-visa

applications are successful, with USCIS approving approximately 85% of the 11,889 applications adjudicated in the year 2016. Id. at 379. The evidentiary burden placed on U-visa applicants is not high, allowing an applicant to establish eligibility with "any credible evidence relevant to th[e] petition." 8 U.S.C. § 1184(p)(4)

The duration of a U-Visa, once granted, is up to four years and may be extended. 8 C.F.R. § 214.14(g). After 3 years, U-Visa holders are eligible for "adjustment of status" from "nonimmigrant" to "lawful permanent resident" if the visa holder's provision of information "has substantially contributed to the ***success*** of an authorized criminal investigation or the prosecution of an individual". 8 U.S.C. § 1255(j) (emphasis added). Permanent residents can then eventually apply to become U.S. citizens. 8 U.S.C. § 1427.

The benefits bestowed upon U-visa holders are also available to their "qualifying family members." See 8 C.F.R. § 214.14(a)(10), (f). Also, a successful U-visa applicant can have a removal (deportation) order cancelled, and an applicant who has already been deported (who would ordinarily be barred from reentry for 10-20 years) can gain immediate legal reentry back into the U.S. 8 C.F.R. §§ 214.14(c)(i), (c)(5)(i)(B); 8 U.S.C. § 1182(a)(9).

Furthermore, a U-visa applicant does not have to wait until the application has been approved to obtain substantial immigration benefits. Although there is ostensibly a cap of 10,000 individuals per year who can receive U-Visa status, 8 C.F.R. § 214.14(d)(1), if the quota is used up, U-Visa applicants are put on a waiting list and they, along with "qualifying family members," will be granted deferred action while they await openings. 8 C.F.R. § 214.14(d)(2). The U.S. Immigration Service can also authorize employment for applicants on the waiting list and their family members in its discretion. Id.; 8 U.S.C. § 1184(p)(6). Essentially, applicants for U-Visas are given a provisional status and can enjoy most of the benefits of an official U-Visa while their applications remain pending.

In short, a U-Visa is an enormous benefit to an undocumented immigrant, even while the application remains pending. See Pritchett, *supra*, at 384 ("the U visa is a highly desirable form of immigration relief for those individuals who qualify" particularly "as deportations continue to rise and as immigration reforms become more draconian").

The crux to the U-visa application process is the requirement that the applicant submit a "U Nonimmigrant Status Certification" from a "Federal, State, or local law enforcement agency, or prosecutor." See 8 U.S.C. §§ 1101(a)(15)(U)(i), 1184(p)(1), (4); 8 C.F.R. § 214.14(c)(2), (4)-(5); Dep't of Homeland Security, Form I-918 Supplement B, U-

Nonimmigrant Status Certification 3 (2016).[1] In the certification, the law enforcement agent or prosecutor certifies that: "the applicant has been a victim of qualifying criminal activity that the certifying official's agency is investigating or prosecuting; the petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity; and the qualifying criminal activity violated U.S. law." 8 C.F.R. §§ 214.14(b)(3), (c)(2)(i). The certification requires further that the certifying official will notify USCIS in the event the applicant subsequently unreasonably refuses to assist in the investigation or prosecution of the crime. See 8 U.S.C. § 1184 (p)(1) (2012); Dep't of Homeland Security, Form I-918 Supplement B, U-Nonimmigrant Status Certification 3.

Adding to the cooperation incentives is 8 U.S.C. § 1255(j), which sets forth the requirements for adjusting one's U-visa status to that of legal permanent resident. Notably, the statute differs from typical arrangements with prosecution witnesses who receive benefits like leniency or witness relocation services. In the ordinary situation, a government witness is required only to testify truthfully in exchange for whatever benefit is

[1] Available at http://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf (accessed on Oct. 12, 2018)

bestowed. But § 1255(j) appears to reward a government witness only if the prosecution obtains a conviction by virtue of its requirement of "the *success* of an authorized criminal investigation or the prosecution of an individual" in order to become a permanent resident, giving the witness a built-in bias to slant testimony to ensure a conviction.

Given the *quid pro quo* nature of the U-visa program, combined with the incredibly valuable benefits bestowed, there exist powerful incentives to bring false or exaggerated accusations against another individual. See Kagan, supra, at 917 ("the U visa established a quid pro quo system in which unauthorized immigrants face considerable pressure to trade testimony in order to remain in the United States"). As one immigration scholar has noted:

> The U visa is an incentive to accuse. The U visa rewards unauthorized immigrants for accusing other people of serious crimes. These rewards are not offered to other people, except perhaps to co-conspirators who testify for the state.

Id. at 943.

Indeed, in one instance, undocumented immigrants paid a police officer to create false police reports and complete fraudulent U-visa certification forms, while also paying immigration attorneys to prepare and submit the fraudulent applications. U.S. Dep't of Justice, *Twelve Defendants Plead Guilty to Marriage and Visa Immigration Fraud*, (Oct.

25, 2016).[2] At the time of the report, seven individuals, including the police officer, pled guilty to participating in the U-visa fraud scheme and four more were awaiting trial. Id. In a news article cited by the Fifth Circuit Court of Appeals, it was reported that one man reported to police that two men approached him in a parking lot, hit him in the head with a gun, and stole $6,000. Mark Becker, *9 Investigates: Illegal Immigrants Faking Crimes to Stay in Charlotte*, WSOC-TV (Nov. 11, 2014, 10:44 AM)[3] (cited in Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, 559 n.60 (5th Cir. 2016)). Police determined that the man, who had an upcoming immigration court hearing, staged the robbery in order to get a U-visa. Id. An immigration attorney was quoted in the article as saying he had seen similarly false accusations from potential clients, and that he turned potential clients away due to the appearance of fraud. Id.

The foregoing is not offered to suggest that the U-visa program is rife with outright fraudulent applications. Nonetheless, the strong motive and opportunity to make false accusations in order to obtain a U-visa cannot be ignored, and the fact is that U-visa fraud exists even if the

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[2] Available at https://www.justice.gov/usao-sdms/pr/twelve-defendants-plead-guilty-marriage-and-visa-immigration-fraud (accessed on Oct. 12, 2018)

[3] Available at http://www.wsoctv.com/news/special-reports/9-investigates-illegal-immigrants-faking-crimes-st/113455640 (accessed on Oct. 12, 2018)

degree of its prevalence cannot be ascertained with certainty. See Romero-Perez, 492 S.W.3d 902 ("The ability to transform oneself from illegal immigrant, to legal visa holder, to permanent legal resident in a relatively short amount of time without ever having to leave the United States, *could* provide a strong motive for fabrication or embellishment"). Even staunch supporters of immigrants and victims' rights acknowledge the problems posed by the *quid pro quo* incentive structure of the U-visa program, concluding that it needs to be overhauled to reduce the currently pervading conflict between the interest in protecting abused migrants and the constitutional rights of criminal defendants. See Pritchett, *supra* (proposing changes to the U-visa program that would disaggregate one's eligibility from an obligation to testify); Kagan, *supra* (same).

B. The Right to Impeach a Prosecution Witness with Evidence of Immigration Benefits Received in Exchange for Cooperation and Testimony Must be Enforced.

Defendants like Mr. Ochoa must be permitted to present evidence of government benefits bestowed upon their accusers in exchange for cooperation and testimony. The testifying U-visa applicant, particularly in the context of a "he said, she said" sexual offense or domestic violence case, poses all of the dangers that the confrontation clause aims to mitigate, as the U-visa program creates motive and opportunity to falsely accuse and the crimes involved are often those that depend entirely on

credibility. This motive and opportunity must be presented squarely to the jury to enable it to serve its truth-seeking function.

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him". U.S. Const. Amend. VI; see Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (extending Sixth Amendment to state proceedings through Fourteenth Amendment). The guarantee of a "meaningful opportunity to present a complete defense" is also grounded in the due process clause of the Fifth Amendment and Article 1, §§ 3 and 22 of Washington's Constitution. Holmes v. South Carolina, 547 U.S. 319, 324, 331, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Constitutional issues, such as an asserted violation of a defendant's Confrontation Clause and due process rights, are reviewed de novo on appeal. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); State v. Dobbs, 180 Wn.2d 1, 10, 320 P.3d 705 (2014).

To effectuate the right of confrontation, the trial court must afford a criminal defendant the opportunity for effective cross-examination of adverse witnesses. Delaware v. Fensterer, 474 U.S. 15, 19-20, 106 S. Ct.

292, 88 L. Ed. 2d 15 (1985). This "includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." Pennsylvania v. Ritchie, 480 U.S. 39, 51-52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). The right of confrontation requires that the defense be given a "maximum opportunity" to test the credibility of a government's key witness. Murdoch v. Castro, 365 F.3d 699, 704 (9th Cir. 2004); "[T]he cross-examiner is not only permitted to . . . test the witness'[s] perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Davis v. Alaska, 415 U.S. 308, 316-316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

A Confrontation Clause violation occurs where a reasonable jury might have received "a significantly different impression of [the witness's] credibility had . . . counsel been permitted to pursue his proposed line of cross-examination." Id.; see also Slovik v. Yates, 556 F.3d 747, 753 (9th Cir. 2009). When a trial turns on the credibility of the complaining witness, which is often the case in sex offense prosecutions, a limitation on impeachment of that complaining witness is particularly likely to be prejudicial to the defendant and deny him due process of law. See Darden, 145 Wn.2d at 619 ("the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or

foundational matters"); Justice v. Hoke, 90 F.3d 43 (2nd Cir. 1996) ("extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground").

Constitutional considerations are magnified still further when the impeachment evidence at issue involves promises of leniency or benefits from the government. See generally 81 Am. Jur. 2d Witnesses § 854; State v. Pickens, 27 Wn. App. 97, 100, 615 P.2d 537, *review denied*, 94 Wn.2d 1021 (1980) ("A defendant has a right to cross examine the State's witness concerning possible self-interest in cooperating with the authorities."); see also United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993) (when the government uses paid informants as witnesses at trial, defense counsel must be permitted "to test such evidence with vigorous cross-examination"). Thus, the Supreme Court has held, in the context of an undisclosed immunity agreement between the government and its witness, that the failure of the prosecution to disclose impeachment evidence violates the defendant's right to due process. Giglio v. United States, 405 U.S. 150, 151, 92 S. Ct. 763, 31 L.E. 2d 104 (1972); see also Belmontes v. Brown, 414 F.3d 1094 (9th Cir. 2005) (A Giglio violation occurred where the prosecutors disclosed an accomplice's plea and immunity agreements, but failed to disclose "unusually favorable

dispositions" the accomplice received from the prosecutor's office in other pending criminal matters).

Applying these principles specifically in the immigration context, the Ninth Circuit Court of Appeals held that the government violated its Brady/Giglio obligations to disclose exculpatory information when the Drug Enforcement Administration identified a source as "simply a paid informant" and refused to disclose the fact that the informant had a "significant relationship" with the INS and was granted a "special parole visa" under which he was allowed to stay in the United States. United States v. Blanco, 392 F.3d 382, 388-90 (9th Cir. 2004). Noting that "the government's case depended heavily on the jury's believing [the informant's] testimony," and that the "defense depended heavily on the jury's believing that [the informant] was a liar," the court in Blanco held that the evidence of the informant's special arrangement with INS was "highly relevant impeachment material" and found it "obvious" that the material "should have been turned over to Blanco under Brady and Giglio." Id. at 387, 392.

Courts have held that defendants are entitled to obtain and use evidence of government inducements even where no agreement exists, but the witness has a mere unilateral expectation of some future benefit. United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992)

The benefit bestowed upon U-visa applicants far exceeds the vague hopes for leniency that longstanding precedent allows defendants to use to impeach witnesses. Even if a witness merely hopes to obtain a U-visa certification from the prosecutor, that clearly constitutes admissible impeachment evidence under the foregoing authorities. One U.S. district court expressly held as much, stating:

> If the victim subjectively believed that a police detective would prepare a certification in support of his U–Visa application, then evidence of the victim's belief and understanding of U–Visa program benefits would have provided relevant impeachment evidence because defense counsel could have argued that the victim would have been motivated to testify by the prospect of immigration benefits, such as eligibility for permanent residence. In other words, even if no benefits were actually promised or provided (as has been found), his belief that such benefits might be forthcoming would certainly be relevant to his motivation to testify for the prosecution.

Briggs v. Hedgpeth, 2013 U.S. Dist. LEXIS 8641, *34 (N.D. Cal. Jan. 22, 2013, No. C 11-3237 PJH) (unpublished).

The State's analysis supporting the trial court's decision to prevent Mr. Ochoa from presenting U-visa impeachment evidence, citing the prejudicial nature of Isidor's immigration status, flies in the face of the foregoing jurisprudence. As a preliminary matter, the trial court's lack of faith in the ability of the jury selection process to reduce bias has routinely been rejected as a valid basis for restricting a defendant's ability to present

his defense. See Olden v. Kentucky, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) ("[s]peculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the complaining witness's] testimony"); Doumbouya v. Cty. Court, 224 P.3d 425, 428-29 (Colo. App. 2009) ("It would be constitutionally problematic to preclude relevant impeachment simply because immigration is a 'hot button topic.'").

Additionally, being a convicted criminal carries as much stigma as being an undocumented immigrant, if not more, depending on the nature of the crime. However, the stigma attached to being a convicted criminal has never been used as a reason to preclude a defendant from impeaching a witness concerning the leniency the witness received, or expects to receive, pursuant to a plea agreement. In any event, the U-visa impeachment evidence is of such high probative value that no government interest can preclude its admission. Jones, 168 Wn.2d at 720 (Where a defendant seeks to present evidence "of high probative value 'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const[itution] Art[icle] 1 § 22'") (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)); Where, as in Mr. Ochoa's case, a prosecution witness expects to receive or has received immigration benefits in exchange for testifying against the

defendant, and witness credibility is an issue in the case, the due process and confrontation clauses, as applied in the foregoing authorities, unequivocally protect the defendant's right to impeach on that basis.

C. A National Consensus has Emerged that Defendants are Entitled to Impeach Witnesses with U-Visa Evidence.

In accord with the foregoing constitutional principles, and in light of the structure of the U-visa program, the Court of Appeals in Mr. Ochoa's case was correct to find persuasive those cases from other jurisdictions holding that the right to confront witnesses in a criminal trial with U-visa evidence prevails over any countervailing interests. See State v. Romero-Ochoa, No. 48454-4-II, 2017 Wash. App. LEXIS 2951, at *17-18 (citing Romero-Perez, 492 S.W.3d 902; State v. Valle, 255 Ore. App. 805, 298 P.3d 1237, 1243 (Or. Ct. App. 2013)).

As stated in the Kentucky appellate decision relied upon in the proceedings below, "The value of [qualifying U-visa] status for those living in immigration limbo cannot be overstated." Romero-Perez, 492 S.W.3d at 906 (emphasis in original). The Kentucky court thus held

> a criminal defendant's right to effectively probe into a matter directly bearing on witness credibility and bias must trump any prejudice that would result from the jury's knowledge of the victim's immigration status. The probative value of disclosing the immigration status and knowledge of the U-Visa program outweighs any prejudice to the witness stemming from such disclosure.

Id.

As noted by another court:

> Simply put, [the victim] had applied for an opportunity to stay in the country on the ground that she had been abused; based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity.

Valle, 255 Ore. App. at 814.

Every other published criminal decision to have considered the issue appears to have reached this same conclusion. See, e.g., State v. Perez-Aguilera, 345 P.3d 295 (Kan. App. 2015) (the defendant's rights were violated by the trial court decision precluding presentation of U-visa impeachment evidence); State v. Del Real-Galvez, 270 Ore. App. 224, 346 P.3d 1289 (2015) (preclusion of U-visa impeachment evidence was prejudicial error even because alleged victim's credibility was central to the prosecution); State v. Hernandez, 269 Or. App. 327, 332, 344 P.3d 538, 542 (2015) (trial court erred in precluding U-visa impeachment evidence because "evidence regarding whether [alleged victim] intended to apply for a U visa was relevant to whether she had a particular personal interest in the outcome of the case.).

Still other courts have taken for granted the general principle that U-visa evidence constitutes legitimate impeachment material. See Commonwealth v. Sealy, 467 Mass. 617, 624-25, 6 N.E.3d 1052, 1058-59 (2014) (upholding trial court ruling allowing U-visa impeachment

evidence, though excluding some evidence related to a prior unrelated U-visa application); State v. Marroquin-Aldana, 2014 ME 47, ¶¶ 38-39, 89 A.3d 519, 530-31 (2014) (lack of access to alleged victim's immigration attorney file was not prejudicial error because defendant nonetheless impeached the victim extensively regarding her U-visa application); State v. Huerta-Castro, 2017-NMCA-026, ¶¶ 45-47, 390 P.3d 185, 199-200 (2017) (the prosecution violated Brady by withholding U-visa evidence from the defense, though error by itself was deemed harmless where the defendant nonetheless was able to cross-examine the witness regarding the U-visa and her prior deportation); State v. Bautista, 271 Or. App. 247, 258-59, 351 P.3d 79 (2015) (trial court erred in allowing alleged victim's prior consistent statements to rebut defense theory that alleged victim fabricated allegations to obtain a U-visa, and error was not harmless because "A's credibility went "directly to the heart of defendant's factual theory of case.")

There is no persuasive justification for deviating from the national consensus on this issue, as the structure of the U-visa program and the nature of a defendant's right to present a defense mandate allowing a defendant to impeach the government's witnesses with evidence of the substantial immigration benefits they stand to receive in exchange for their testimony.

IV. CONCLUSION

For the foregoing reasons, the Court of Appeals decision should be upheld and the trial court judgment and sentence against Mr. Ochoa should be reversed.

Respectfully submitted this 23rd day of October, 2018.

David T. Sulzbacher, WSBA #51555
Attorney for Amicus Curiae WACDL

Thomas E. Weaver, WSBA #22488
Attorney for Amicus Curiae WACDL

Rita Griffith, WSBA #14360
Attorney for Amicus Curiae WACDL

THE LAW OFFICE OF THOMAS E. WEAVER

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